Supreme Court, U.S.
FILED
MAR 21 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. KRAFT
SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
1415 5th Avenue, Suite 900
Seattle, WA 98171
(206) 621-9168

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

I.

QUESTION PRESENTED

Whether "special and important reasons" exist which would warrant the granting of this Petition for Writ of Certiorari?

II.

PARTIES

Harriet M. Gould, petitioner, a Washington citizen; Mutual Life Insurance Company of New York (hereinafter referred to as MONY), respondent, a New York corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	i
I. STATUTES	2
II. STATEMENT OF THE CASE	4
III. THIS PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY SPECIAL AND IMPORTANT REASONS AS LISTED IN SUPREME COURT RULE 17	7
A. The United States District Court had Jurisdiction Pursuant to 28 U.S.C. 1332(a) to Render a Judgment in This Case	9
B. Petitioner's Reliance On *Burrier* v. *Mutual Life Insurance Company of New York,* 387 P.2d 58, 63 Wn.2d 266 (1963) is Misplaced, as That Case Does Not Deal With the Standard of Proof Required in an Action Under the Washington Consumer Protection Act	12
C. The District Court and Ninth Circuit's Denial of Petitioner's Motion for Certification to the Supreme Court of Washington Rested in the Sound Discretion of the Federal Courts, and Does Not So Depart From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision	15
D. The Decision of the Court of Appeals of the State of Washington on Resident Defendants' Dismissal Pursuant to Washington Civil Rule 12(b)(6) does not Bar the Federal Courts from Adjudication here	16

Table of Contents continued

Page

IV. Conclusion 18

Appendices:

Appendix 1. Statement of Reasons in Support of Motion for Remand and Citations of Authority Upon Which Movant Relies 1a

Appendix 2. Order Denying Plaintiff's Motion for Remand 4a

Appendix 3. Order Denying Plaintiff's Motions for Relief From Judgment and Certification 7a

TABLE OF AUTHORITIES

CASES: Page

American Fire and Casualty Co. v. *Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951) 10-11

Baggs v. *Martin*, 179 U.S. 206, 21 S. Ct. 109 (1900) ... 10

Burrier v. *Mutual Life Insurance Company of New York*, 387 P.2d 58, 63 Wn.2d 266 (1963) 12

C.I.R. v. *Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967) 14

Erie Ry. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 1938 13

Federated American Ins. Co. v. *Strong*, 102 Wn.2d 665 (1984) 15

Gould v. *Mutual Life Insurance Company of New York*, 863 P.2d 207, 37 Wn.App. 756 (1984) 16, 17

Grubbs v. *General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344 (1972) 10, 11

Guaranty Trust Co. of New York v. *York*, 326 U.S. 99, 65 S. Ct. 1464 (1945) 14

Lehman Brothers v. *Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L.Ed.2d 215 (1974) 15-16

Levy v. *North Am. Co. for Life & Health Ins.*, 586 P.2d 845, 847, 848, 90 Wn.2d 848 (1978) 12

Mackay v. *United Development Co.*, 229 U.S. 173, 33 S. Ct. 638 (1913) 10

Miller v. *Indiana Ins. Cos.*, 642 P.2d 769, 31 Wn.App. 475, 479 (1982) 12, 13, 15

Phil Schroeder, Inc. v. *Royal Globe Insurance Co.*, 659 P.2d 509, 514, 99 Wn.2d 6574 (1983 *en banc*) . 13, 14, 15

Pruitt v. *Alaska Pacific Assurance Co.*, 626 P.2d 528, 28 Wn.App. 802, 804, 805 (1981) 12, 13, 15

TABLE OF AUTHORITIES continued

Page

Salois v. *Mut. of Omaha Ins. Co.*, 581 P.2d 1349, 90 Wn.2d 355 (1978) 12

STATUTES:

28 U.S.C. 1292(b) 2, 5, 11

28 U.S.C. 1332(a) 2, 4, 9

28 U.S.C. 1441 ..... 2, 4

28 U.S.C. 1446(b) 3, 4

Washington Civil Rule 54(b) 9

Fed.R.Civ.P. 12(b)(6) 4, 6

Fed.R.Civ.P. 54(b) 5

U.S. Supreme Court Rule 17 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1330

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mutual Life Insurance Company of New York (hereinafter MONY) respectfully submits this response to petitioner Harriet M. Gould's Petition for a Writ of Certiorari to Review the Decision and Judgment of the United States Court of Appeals for the Ninth Circuit.

I.

STATUTES

28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof shall so order.

28 U.S.C. § 1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1441:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a

State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

28 U.S.C. § 1446(b):

The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

II.

STATEMENT OF THE CASE

Petitioner brought this action in the Superior Court of the State of Washington under the Washington Consumer Protection Act, RCW 19.86, seeking damages from respondent MONY, its attorneys Robert L. Israel and C. William Bailey, and their marital communities, for the denial of her claim for the $25,000.00 benefits on a MONY policy on her husband's life. Petitioner had successfully litigated her entitlement to the proceeds in a prior state court action. Defendants Israel and Bailey had represented MONY in that litigation.

There is no dispute that petitioner and state court defendants Israel and Bailey at all times material have been residents of the State of Washington. There is also no dispute that respondent MONY is a New York corporation, and that petitioner's claim exceeds $10,000.00, exclusive of interest and costs. Had petitioner originally brought her claim against MONY in the United States District Court, that court would have had subject-matter jurisdiction. 28 U.S.C. § 1332 (a).

Defendants Israel and Bailey moved the state court for dismissal pursuant to Washington Civil Rule 12 (b)(6) (identical to Fed.R.Civ.P. 12(b)(6)). The state trial court granted defendants' motion.

Upon the dismissal of the resident defendants, respondent MONY filed a petition for removal pursuant to 28 U.S.C. § 1441 and § 1446 in the United States District Court for the Western District of Washington. The District Court thereupon took jurisdiction of peti-

tioner's claim against respondent MONY. In her Petition for Writ of Certiorari, petitioner identifies the marital communities of both Mr. Israel and Mr. Bailey as parties to this federal action. Defendants Israel and Bailey have at no time been parties to this action in the federal courts, and the Court should not be misled by petitioner's attempts to create a diversity question through their inclusion in the identification of parties contained in the petition.

Petitioner filed a motion for remand in the District Court, contending that as the original state court order dismissing defendants Israel and Bailey did not contain either an express determination that there was no just reason for delay or an express direction for the entry of judgment, the dismissal was not final in that petitioner had no right to appeal. (Washington Civil Rule 54(b), which is identical to Fed.R. Civ.P. 54(b)) *See* Appendix 1. Prior to the determination of petitioner's motion for remand, the state court entered an amended order dismissing defendants Israel and Bailey, including the C.R. 54(b) language which rendered the dismissal a final judgment. Petitioner took a timely appeal to the Court of Appeals of the State of Washington.

The entry of the order containing the C.R. 54(b) language rendered petitioner's motion for remand moot, and the motion for remand was accordingly denied by the U.S. District Court judge. *See* Appendix 2. Petitioner did not seek certification of the District Court pursuant to 28 U.S.C. § 1292(b) for the purpose of appealing the denial of the motion for remand to the United States Court of Appeals for the Ninth Circuit.

Subsequent to the District Court's denial of petitioner's motion for remand, petitioner affirmatively processed her lawsuit through the District Court. Two separate sets of interrogatories were served upon counsel for respondent MONY, together with a request for production of documents. Pursuant to the latter request, respondent produced to petitioner over 300 pages of documents. On the basis of responses to these discovery requests, petitioner filed in the District Court a motion for summary judgment, contending that she was entitled to a finding of liability under the Washington Consumer Protection Act as a matter of law. Concurrently, respondent filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), or in the alternative, a motion for summary judgment. Petitioner responded to respondent's motion in writing, and counsel participated in oral argument before the District Court at the hearing on the cross-motions for summary judgment.

The District Court granted defendant's motion for summary judgment, and denied plaintiff's motion for summary judgment. Judgment was entered accordingly, and petitioner's case was dismissed.

Subsequent to the entry of judgment, petitioner filed a motion for reconsideration, a motion for new trial and other relief provided by Rule 59, an amended motion for relief pursuant to Rules 59 and 60, and a second amended motion for relief pursuant to Rules 59 and 60. Memoranda and affidavits were filed with the court in support of these motions. The post-judgment motions were denied by the District Court. *See* Appendix 3.

Petitioner took a timely appeal to the United States Court of Appeals for the Ninth Circuit. Petitioner did not raise the issue of the propriety of removal from the state court to the District Court in either her initial brief to the Ninth Circuit, in her reply brief, or at oral argument before the Ninth Circuit. On June 25, 1984, the Ninth Circuit affirmed the District Court's judgment, dismissing petitioner's complaint. Petitioner next filed a petition for reconsideration of opinion dated June 25, 1984 and suggestion for rehearing en banc. Petitioner raised therein for the first time before the Ninth Circuit the issue of the District Court's jurisdiction. By order dated September 27, 1984, the Ninth Circuit denied the petition for reconsideration.

This petition for writ of certiorari followed.

III.

THIS PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY SPECIAL AND IMPORTANT REASONS AS LISTED IN SUPREME COURT RULE 17

Supreme Court Rule 17 sets forth the considerations governing review on a petition for writ of certiorari. That rule states:

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's

discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for writ of certiorari at bar does not state any manner in which the decision of the Ninth Circuit was in any way in conflict with another federal court of appeals, a state court of last resort, or departed so far from the accepted and usual course of judicial proceeding or so far sanctioned such a departure as to call for the exercise of this Court's power of supervision. Nor does the petition set forth any manner in which the Ninth Circuit's decision decides an important question of federal law which has not been settled by the United States Supreme Court, or decides any federal question in a way in conflict

with an applicable decision of the United States Supreme Court.

Respondent MONY respectfully submits that as no such special or important reason for granting the writ has been set forth, the petition for writ of certiorari should be denied.

A. The United States District Court had Jurisdiction Pursuant to 28 U.S.C. 1332 to Render a Judgment in This Case.

Petitioner contends that the District Court lacked jurisdiction and improperly allowed removal due to the fact that the resident defendants had been involuntarily dismissed from the state court action, from which appeal was pending. It is not disputed that petitioner is a resident of the state of Washington, while respondent MONY is a New York corporation, and that the claim exceeded $10,000.00, exclusive of interest and costs. Accordingly, the District Court would have had original jurisdiction of petitioner's claim against MONY had it been brought initially in the District Court. 28 U.S.C. 1332(a).

Even if it were to be assumed *arguendo* that removal was improper due to the pending state court appeal, petitioner's objection to the removal failed to address the grounds of irregularity on which she now seeks to contest propriety of the removal. In her Statement of Reasons in Support of Motion for Remand and Citations of Authority upon which movant relies (Appendix 1), petitioner stated only that she was entitled to a remand to the state court as the state court order dismissing the resident defendants did not contain the language of Washington Civil Rule 54(b), rendering such a final judgment. Petitioner claimed that as no

final judgment existed under Washington court rules, she had no right to appeal. As a state court order containing such language and rendering the judgment final was subsequently entered, and provided to the District Court, petitioner's motion to remand on the reasons stated became moot.

This court has repeatedly held that a United States District Court judgment will be upheld, even though irregularity may have existed in the removal to the federal courts, where the District Court would have had original jurisdiction of the claims before it had they initially been brought in the federal court. *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344 (1972); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951); *Mackay* v. *United Development Co.*, 229 U.S. 173, 33 S. Ct. 638 (1913); *Baggs* v. *Martin*, 179 U.S. 206, 21 S. Ct. 109 (1900). The rule has been stated as follows:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprise the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied upon as a foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with the jurisdiction it could not possess.

American Fire and Casualty Co. v. *Finn,* 341 U.S. at 16, 17, 71 S. Ct. at 541.

It is important to note that after the District Court determined petitioner's motion for remand to be moot, and denied the same, petitioner processed her claim through the Court to a final determination. *See* Statement of the Case, pages 4-7, *supra.* Petitioner did not request that the District Court certify the issue of removability to the Ninth Circuit, pursuant to 28 U.S.C. 1292, nor did petitioner present the issue to the Ninth Circuit either by brief or in oral argument. Only after the Ninth Circuit affirmed the judgment of the District Court did petitioner file her motion for reconsideration, presenting therein the issue of the District Court's subject-matter jurisdiction. As this Court has determined that the validity of a removal procedure followed may not be raised for the first time on appeal, *Grubbs* v. *General Electric Credit Corp., supra* at 700, it cannot be contended that the Ninth Circuit's denial of the petition for reconsideration has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

On the basis of the foregoing, respondent respectfully submits that petitioner's presentation of a jurisdictional issue here does not present a situation which meets the criteria set forth in Supreme Court Rule 17. As no special or important reason exists, respondent MONY respectfully submits that the petition for writ of certiorari should be denied.

B. Petitioner's Reliance On *Burrier* v. *Mutual Life Insurance Company of New York*, 387 P.2d 58, 63 Wn.2d 266 (1963) is Misplaced, as That Case Does Not Deal With the Standard of Proof Required in an Action Under the Washington Consumer Protection Act.

Petitioner contends the United States Court of Appeals for the Ninth Circuit refused to follow the settled law of the State of Washington concerning a life insurer's invocation of the suicide exclusion to a life insurance policy, citing *Burrier* v. *Mutual Life Insurance Company of New York*, 387 P.2d 58, 63 Wn.2d 266 (1963). The issue in *Burrier* v. *Mutual Life Insurance Company, supra* was whether a jury instruction setting forth the presumption against suicide was proper. The case involved no allegation that the insurer had acted unlawfully in asserting the suicide defense, nor was that issue before the court. The appellate courts of the state of Washington have yet to decide the character of evidence an insurer must have to lawfully assert the affirmative defense of a policy's suicide exclusion.

As recognized by the Ninth Circuit, an insurer's breach of its duty to deal with an insured in good faith constitutes a violation of the Washington Consumer Protection Act. *Levy* v. *North Am. Co. for Life & Health Ins.*, 586 P.2d 845, 847, 848, 90 Wn.2d 846, 848 (1978) (citing *Salois* v. *Mut. of Omaha Ins. Co.*, 581 P.2d 1349, 90 Wn.2d 355 (1978). However, the mere denial of benefits due to a debatable question of coverage is insufficient to show bad faith. *Miller* v. *Indiana Ins. Cos.*, 642 P.2d 769, 31 Wn.App. 475, 479 (1982); *Pruitt* v. *Alaska Pacific Assurance Co.*, 626 P.2d 528, 28 Wn.App. 802, 804, 805 (1981). Bad

faith requires a showing of a frivolous and unfounded denial of benefits. *Miller* v. *Indiana Ins. Cos., supra* at 479.

On the record before the District Court and the Ninth Circuit, a debatable question of coverage existed, which, as a matter of law, was insufficient to demonstrate bad faith under the Washington Consumer Protection Act. The portion of the record supporting the finding of the United States Court of Appeals for the Ninth Circuit is set forth at 735 F.2d at 1167, petitioner's Appendix A at A-3 and A-4.

Petitioner further contends that the Ninth Circuit's citation of *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 659 P.2d 509, 514, 99 Wn.2d 6574 (1983 *en banc*) reconsideration granted, 99 Wn.2d 1019 (1983) modified, 683 P.2d 183, 101 Wn.2d 830 (1984), ". . . is a flagrant violation of the authority and jurisdiction of the federal courts under both Erie [*Ry.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 1938)] and 28 U.S.C. 1652." *See* Petition for Writ, at page 12. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co., supra,* is the sole decision of the Supreme Court of the State of Washington dealing with an insurer's liability under the Washington Consumer Protection Act based upon the outright denial of a claim. In a decision which paralleled the earlier decisions of the intermediate Court of Appeals of the State of Washington in *Miller* v. *Indiana Ins. Cos., supra* and *Pruitt* v. *Alaska Assurance Co., supra,* the Supreme Court of Washington held that an insurer's denial of a claim based upon a "reasonable and valid ground" does not give rise to

a claim under the Washington Consumer Protection Act. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 99 Wn.2d at 74.

The insured filed a motion for reconsideration in *Schroeder* which was granted, but prior to reargument, the parties settled their dispute and filed a stipulation requesting that the appeal be dismissed. Pursuant to the settlement and stipulation, the Supreme Court of Washington modified its earlier opinion, deleting the portion of the opinion addressing the Washington Consumer Protection Act claim. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 101 Wn.2d 830, 831, 683 P.2d 186 (1984).

Federal courts are bound in diversity cases to follow state rules of decisions in matters which are substantive rather than procedural, or where the matter is outcome determinative. *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 65 S. Ct. 1464 (1945). An intermediate state court is a datum for ascertaining state law which is not to be disregarded by federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See C.I.R.* v. *Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967), citing *King* v. *Order of United Commercial Travelers*, 333 U.S. 154, 160, 161, 68 S. Ct. 488, 492, 92 L.Ed. 608 (1948).

Even were it to be assumed that the opinion in *Phil Schroeder, Inc.* v. *Royal Globe Ins., supra*, could not serve as binding authority for the decision of the federal courts, the opinion is indicative of the manner in which the Supreme Court of Washington would rule if presented with the question of an insurer's

liability under the Washington Consumer Protection Act for the denial of a claim based upon a debatable question of coverage.[1] Furthermore, the United States Court of Appeals for the Ninth Circuit properly followed the law as set down in *Miller* v. *Indiana Ins. Co., supra* and *Pruitt* v. *Alaska Pacific Assurance Co., supra* in resolving the instant suit. Petitioner's argument with respect to the Ninth Circuit's citation of *Phil Schroeder, Inc.* v. *Royal Globe Ins. Co.*, fails to support a conclusion that the decision of the Ninth Circuit decided a federal question in a way in conflict with a state court of last resort. Supreme Court Rule 17.1.(a). Accordingly, respondent MONY respectfully submits that the petition for writ of certiorari should be denied.

C. The District Court and Ninth Circuit's Denial of Petitioner's Motion for Certification to the Supreme Court of Washington Rested in the Sound Discretion of the Federal Courts, and Does Not So Depart From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

This Court has previously determined that a federal court certification of a local law question to a state supreme court rests within the sound discretion of the federal court. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L.Ed.2d 215

---

[1] Justice Pearson, in an opinion concurring in part and dissenting in part from the Supreme Court of Washington majority holding in *Federated American Ins. Co.* v. *Strong*, 102 Wn.2d 665 (1984), stated that a denial of benefits must be "frivolous and unfounded", citing *Miller* v. *Indiana Ins. Cos., supra*, to support a finding of bad faith under the Washington Consumer Protection Act.

(1974). As was the case before the Ninth Circuit, the instant petition presents no compelling reason to use the certification procedure set out by RCW 2.60.020.

Accordingly, petitioner's concern over the Ninth Circuit's denial of her motion for certification does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1.(a). On this basis, the petition for writ of certiorari should be denied.

D. The Decision of the Court of Appeals of the State of Washington on Resident Defendants' Dismissal Pursuant to Washington Civil Rule 12(b)(6) does not Bar the Federal Courts from Adjudication here.

This petition for writ of certiorari presents petitioner's initial assertion that the federal courts were precluded from reaching a determination of this cause by the doctrine of collateral estoppel. *See* Petition for Writ, at pages 13 and 14. Petitioner cites the decision of the Court of Appeals of the State of Washington in *Gould* v. *Mutual Life Insurance Company of New York*, 863 P.2d 207, 37 Wn.App. 756 (1984) as the prior decision she seeks to assert as a bar. This argument is without merit.

The issue before the Court of Appeals of the State of Washington was whether petitioner's state court complaint against resident defendants Israel and Bailey stated a cause of action under Washington law. The Court of Appeals determined that, accepting the allegations of the Complaint as true, resident defendants Israel and Bailey acted as de facto corporate officers and in that capacity engaged in conduct

for which personal liability could be imposed. *See* Petitioner's Appendix C at C-5. The Court of Appeals accordingly determined that the Complaint did state a cause of action under Washington law and remanded the case to the state trial court for further proceedings.

The issue before the United States Court of Appeals for the Ninth Circuit was not whether petitioner's complaint stated a cause of action, but whether the record before the District Court presented any issue of material fact which would support a jury finding of liability on the part of respondent MONY. Whether the complaint stated a cause of action was not raised in the federal courts.

It is one thing to state a cause of action, and another to prove it. Although the Court of Appeals for the State of Washington determined that the state court complaint stated a cause of action, the District Court and the Ninth Circuit determined that petitioner was unable to put forward any evidence which would support her claim against respondent MONY. Accordingly, the decision of the Court of Appeals of the State of Washington in *Gould* v. *Mutual Life Insurance Company of New York, supra* does not serve to bar this litigation in the federal courts.

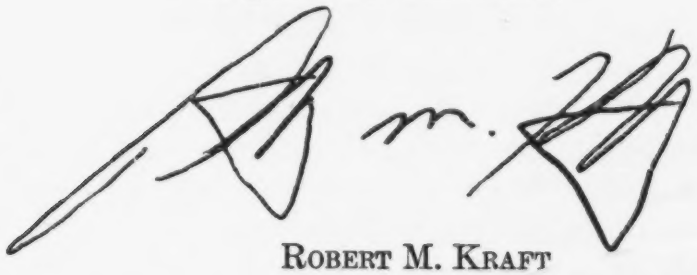
Respondent MONY respectfully submits that petitioner's argument regarding the doctrine of collateral estoppel does not meet any of the considerations governing review on certiorari as set forth in Supreme Court Rule 17, and that the petition for writ of certiorari should be denied.

IV.

CONCLUSION

The instant petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit fails to present any special and important reasons, as set forth in Supreme Court Rule 17, warranting review by this Court. On the basis of the foregoing, respondent Mutual Life Insurance Company of New York respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



ROBERT M. KRAFT
SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
1415 5th Avenue, Suite 900
Seattle, WA 98171
(206) 621-9168

Attorneys for Respondent

APPENDIX

APPENDIX 1.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-230R

HARRIET M. GOULD, an unremarried widow,
Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, ROBERT ISRAEL and JANE DOE ISRAEL, his wife, C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,

Defendants.

STATEMENT OF REASONS IN SUPPORT OF MOTION FOR REMAND AND CITATIONS OF AUTHORITY UPON WHICH MOVANT RELIES

PLAINTIFF'S Complaint and First Amended Complaint designates Robert L. Israel and Jane Doe Israel, his wife, and C. William Bailey and Jane Doe Bailey, his wife, as parties defendant in addition to Mutual Life Insurance Company of New York. The plaintiff's complaint alleges that the Israels and the Baileys reside in King County, Washington. See paragraphs II and III of plaintiff's First Amended Complaint. In paragraph I of both plaintiff's Complaint and First Amended Complaint, plaintiff alleges that she is a resident of King County, State of Washington.

Defendant Mutual Life Insurance Company of New York has not presented any affidavit or other evidence that there is any diversity of citizenship between plaintiff and the Israels and the Baileys.

The petitioner, Mutual Life Insurance Company of New York has furnished the court with a copy of "Order and Judgment of Dismissal of Defendants Israel and Bailey with Prejudice". That order fails to comply with Superior Court Rule 54(b) in that said order does not make an express determination that there is no just reason for delay, nor does the order expressly direct the entry of judgment. Without such determination and direction the order is subject to revision at any time before the entry of judgment adjudicating all claims and rights and liabilities of the parties.

Without such adjudication and determination in the order, plaintiff has no right to appeal to the Court of Appeals. Rules of Appellate Procedure for the State of Washington provide under Rule 2.2(d) that in the absence of the finding and adjudication required in Superior Court Rule 54(b) the judgment is not final and plaintiff has no right to appeal.

In *Doerflinger vs. New York Life Insurance Company*, 88 Wn2d 878, 567 P.2d 230 (1977), the Supreme Court of the State of Washington reviewed the rule, and reiterated the doctrine forbidding piecemeal appeals.

Under the record as submitted by the petitioner, diversity of citizenship does not exist between plaintiff and all of the defendants, and as a result this court coes not have original jurisdiction as defined

under 28 U.S.C. 1332, and there is no federal question presented pursuant to 28 U.S.C. 1331.

Under the allegations of plaintiff's complaint all defendants are jointly and severally liable to plaintiff for her claim for relief.

RESPECTFULLY submitted,

DATED this 10th day of March, 1982.

/s/ Vaughn E. Evans
VAUGHN E. EVANS, Attorney for Plaintiff

APPENDIX 2.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C82-230R

HARRIET M. GOULD, an unremarried widow,
Plaintiff,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, ROBERT ISRAEL and JANE DOE ISRAEL, his wife, C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND

[Filed in the United States District Court, Western District of Washington, Mar 25, 1982, Bruce Rifkin, Clerk, by /s/E T, Deputy]

THIS MATTER comes before the court on a motion by plaintiff to remand this action to the Superior Court of the State of Washington in and for the County of King. The court, having reviewed the motion, memoranda of parties, affidavits, and other files and records pertinent hereto, hereby finds and rules as follows:

Defendant Mutual Life Insurance Company of New York (hereinafter "defendant") has removed this ac-

tion to federal court on the grounds that diversity of citizenship exists. Defendant's removal is based on an order and judgment of dismissal of defendants Israel and Bailey with prejudice entered by the Superior Court in and for the County of King, which order dismisses with prejudice all of the defendants in this action save Mutual Life Insurance Company of New York. Defendant filed its petition for removal within thirty days of that order. There is no question that the petition for removal and bond in support thereof was timely and properly filed. Plaintiff's sole grounds for remand is that the order of judgment and dismissal of defendants in the state action did not make an express determination that there was no just reason for delay and did not expressly direct the entry of judgment and that therefore the order was not final in conformity with Superior Court Rule 54(b).

Since the date of the entry of the order, the Superior Court has entered a further order and final judgment of dismissal of defendant Israel and Bailey with prejudice. The further order sets forth with particularity all factors necessary to render it a final judgment pursuant to Superior Court Rule 54(b). Since this further order resolves any question about whether the original order was final or not, the court finds that plaintiff's motion to remand is moot and should be denied.

IT IS NOW, THEREFORE, ORDERED plaintiff's motion for remand is hereby DENIED.

The clerk of the court is directed to send uncertified copies of this order to counsel of record.

DATED at Seattle, Washington this 24th day of March 1982.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX 3.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C82-230R

HARRIET M. GOULD,

Plaintiff,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

ORDER DENYING PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND CERTIFICATION

[Filed in the United States District Court, Western District of Washington, Apr 18, 1983, Bruce Rifkin, Clerk, By —— Deputy]

ON MARCH 1, 1983 this court entered an order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. Judgment was entered dismissing the action March 2, 1983. Plaintiff now moves for relief from judgment pursuant to Fed. R. Civ. P. 59 and 60 and for certification of state law issues to the Washington Supreme Court.

Plaintiff argues that the court's order holding plaintiff's Consumer Protection Act claim insufficient as a matter of law is riddled with errors. Plaintiff protests the court's use of a case not cited by the parties, claiming a deprivation of due process of law thereby. Plaintiff disputes the court's interpretation of Washington

consumer protection law and the complaint, attempting to recharacterize her claim. Plaintiff requests oral argument of unlimited duration and the opportunity to present yet another brief of excessive length.

The motions are without merit. This Court's interpretation of applicable law was confirmed by the Washington Supreme Court in *Phil Schroeder, Inc. v. Royal Globe Insurance Co.*, 99 Wn. 2d 65, 74 (1983). There, the insurer's refusal to pay under a policy was based on its erroneous interpretation of policy language. Since the interpretation was debatable under prior law, however, the court refused to allow liability against the insurer under the Consumer Protection Act. Similarly, although defendant's theory of this case was ultimately not accepted by the jury, it was supported by evidence capable of sustaining a jury verdict. The Consumer Protection Act affords no remedy under these circumstances.

Plaintiff's motions for relief from judgment and for certification to the Washington Supreme Court are DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 15th day of April, 1983.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE